

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FORREST LEE KNOX,

Defendant-Appellant.

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UNPUBLISHED

March 1, 2007

No. 265999

Oakland Circuit Court

LC No. 2005-200378-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle under the influence of liquor (OUIL), third offense, MCL 257.625, and driving with a suspended license, MCL 257.904. He was sentenced to five years' probation, with the first year to be served in jail, and fines of \$1,250. He appeals by right, challenging the trial court's denial of his pretrial motion to dismiss the OUIL, third offense, charge on double jeopardy grounds. We affirm.

We review de novo the trial court's denial of defendant's motion to dismiss on the basis of double jeopardy. *People v Davis*, 472 Mich 156, 159; 695 NW2d 45 (2005). The double jeopardy provisions in Const 1963, art 1, § 15, and US Const, Am V, are construed consistently. *People v Nutt*, 469 Mich 565, 591; 677 NW2d 1 (2004). The prohibition against double jeopardy provides the following related protections: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Id.* at 574.

In this case, defendant's motion implicates the second prosecution strand of the Double Jeopardy Clause because defendant claimed that pending proceedings in the 47th District Court prohibited a trial on the OUIL, third offense, charge in circuit court. We note that the March 1, 2005, transcript and other records from the 47th District Court which the parties have submitted on appeal are not part of the circuit court record. "This Court's review is generally limited to the record of the trial court, and it will generally allow no enlargement of the record on appeal." *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). But pursuant to MCR 7.216(A)(4), this Court is empowered to permit additions to the record. See *People v Nash*, 244 Mich App 93, 99-100; 625 NW2d 87 (2000). Under the circumstances, and because the parties do not dispute the authenticity of the records

from the 47th District Court, we shall consider those records for the limited purpose of determining whether defendant's jury trial in this case was barred by double jeopardy.

It is apparent from the records in defendant's district court case that there were procedural deficiencies in the manner in which proceedings were initiated against defendant to charge him with violating a prior probationary order based on various grounds, including his commission of the charged OUIL offense in this case. The district court did not issue a summons or arrest warrant as required by MCR 6.445(A) to initiate probation violation charges. Further, the order signed by the district court which required defendant to appear to show cause why he should not be held in criminal contempt for violating the probationary order was facially defective because it was not supported by the required affidavit. See MCR 3.606(A); *In re Contempt of Steingold*, 244 Mich App 153, 159; 624 NW2d 504 (2000) (an absent or inadequate affidavit deprives a trial court of jurisdiction over the person of the alleged contemnor).

But the consequence of any procedural error was a matter to be raised and resolved in the district court case. Our concern in this case is whether the pending district court matter precluded defendant's trial for OUIL, third offense, in this case. Jeopardy does not attach for purposes of the Double Jeopardy Clause until a defendant is put on trial before the trier of fact. *People v Hicks*, 447 Mich 819, 826; 528 NW2d 136 (1994) (Griffin, J.). Jeopardy attaches at a bench trial when a trial court begins to hear evidence. *Id.* at 826-827.

We are not bound by defendant's characterization of the March 1, 2005, district court hearing at which the probation officer testified regarding defendant's probation violations. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Regardless of any procedural error in the manner in which the district court proceeding was initiated, it is clear from the record that the trial court only conducted a probation violation hearing. Probation violation hearings are not criminal prosecutions and do not raise double jeopardy concerns. See *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). Because the district court did not conduct a criminal contempt hearing, defendant's claim that his circuit court trial in this case was prohibited on double jeopardy grounds fails as a matter of law.

Accordingly, it unnecessary to consider the alternative grounds the prosecutor raises to argue that no double jeopardy violation occurred.

We affirm.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ Kurtis T. Wilder